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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 482

CHICAGO, SAINT PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; CORNELIUS W. STYER, DOING BUSINESS AS NORTHERN TRANSPORTATION COMPANY; AND GLENDENNING MOTORWAYS, INC.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

APPELLANTS' BRIEF.

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OPINIONS BELOW.

The opinion of the District Court is reported in 50 F. Supp. 249. (R. 56.) The report of the Interstate Commerce Commission (R. 5) is not published in its official reports.

JURISDICTIONAL STATEMENT.

Statement as to jurisdiction was filed, and probable jurisdiction noted on December 13, 1943. (R. 211.)

This is an action by appellants to annul an order of the Interstate Commerce Commission, tried before a district court of three judges, 28 U. S. C. A. 41 (28), 44, 47, 47a, and brought to this Court by direct appeal from the decree dismissing appellants' complaint, 28 U. S. C. A. 345 (4). *Alton Railroad Co.* v. *United States*, 315 U. S. 15.

STATEMENT OF THE CASE.

Appellants, five railroads operating in Minnesota and South Dakota (and elsewhere), sued appellees to annul an order and certificate of the Commission granting operating authority as a motor carrier to appellee Cornelius W. Styer, doing business as Northern Transportation Company. Appellee Glendenning Motorways, Inc., is the present owner of such certificate, by purchase from Styer.

At the trial in the district court appellants introduced in evidence a certified transcript of the proceedings before the Commission. Appellees Styer and Glendenning Motorways, Inc., introduced evidence in support of their claim that appellants' right to sue is barred by laches arising from delay in the commencement of the action.

Two classes of rights are included in the order and certificate. Certain of such rights were granted, in Commission Docket No. MC-47644, under the "grandfather" clause of section 206(a) of Part II of the Interstate Commerce Act, 49 U. S. C. A. 306(a), which provides:

> "* * * if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation * * *."

Certain other of such rights were granted, in Docket No. MC-47644, Sub. No. 1, under the provisions of Sections 206(a) and 207(a), 49 U. S. C. A. 306(a), 307(a), which require a showing that the proposed service "is or will be

required by the present or future public convenience and necessity."

Separate hearings were held in the proceedings under each docket number. The Commission issued a single report and order and certificate covering both. (R. 5, 18.) In each proceeding the authority granted was to operate in both directions over certain Minnesota and South Dakota highways to and from each point on such highways (with one exception to be noted).

The routes authorized are shown on the map, prepared by appellants, which is inside the back cover page of this brief. The single black line represents the highways over which "grandfather" rights were granted in Docket No. MC-47644. Service was authorized to and from all points on such highways. The double black line represents the highways over which rights were granted in Docket No. MC-47644, Sub. No. 1, based on a claim of public convenience and necessity. Service was authorized to and from all points on such highways. The exception heretofore referred to is the following. In the "grandfather" case Styer was authorized to operate over the highways represented by the double black line between the Twin Cities (St. Paul-Minneapolis) and Mitchell, South Dakota, both ways, serving only the termini named and not serving the intermediate points.

Styer exhibits 1 and 2 before the Commission (R. 126A) are, respectively, maps of Minnesota and South Dakota, offered by Styer to indicate the authority sought. The legend "B. M. C.-1 routes" means routes over which "grandfather" rights were sought. "B. M. C.-8 routes" means routes over which authority was sought on grounds of public convenience and necessity. "Compliance order routes granted" indicates routes over which "grandfather" authority was granted by a Commission order dated June

8, 1938, which was set aside on September 15, 1938, after Styer filed exceptions to it. The 1938 order did not authorize service to any intermediate point in Minnesota.

In the "grandfather" case, it was stipulated by the parties that Styer did not claim "grandfather" rights and was not applying for authority to carry property in interstate commerce from any Minnesota point to any Minnesota point. (R. 97.) Styer offered no evidence as to any operations during the "grandfather" period from any Minnesota point to any Minnesota point. Styer made the claim through counsel, and testified and presented evidence in support of such claim, that his *eastbound* "grandfather" operation from South Dakota to Minnesota consisted of an *irregular* route operation to widely scattered Minnesota points, none of which were on the *regular* "grandfather" routes granted by the Commission. (R. 97-98, 102-106.)

In the public convenience and necessity case Styer filed, before the case was heard, a written amendment to his application which was accepted by the Joint Board hearing the case. (R. 190.) Among other things the amendment withdrew from the application request for authority as to "all service in interstate commerce between points in Minnesota." (R. 196.) Styer offered no evidence respecting the need for the service to or from the points withdrawn by the amendment. (R. 190-195.)

Appellants filed a petition for reconsideration of the report and order of the Commission, Division 5, and this was denied on April 6, 1942. (R. 3, 23.) Appellants commenced this action on October 30, 1942. (R. 1.)

ASSIGNMENT OF ERRORS.

The District Court erred in its final decree dismissing plaintiffs' complaint, and in its opinion, findings of fact, and conclusions of law upon which its decree is based, in the following respects:

1.

The order of the Interstate Commerce Commission authorized defendant-appellee Styer to continue alleged "grandfather" operations under Section 206 (a) of the Interstate Commerce Act over regular routes between St. Paul, Minnesota, and points in South Dakota, and to serve all Minnesota points on such routes east and westbound. The order was erroneous and should have been annulled by the District Court as to all points in Minnesota except St. Paul and Minneapolis, for the following reasons:

(a) A stipulation was made during the hearing before the Joint Board, between Styer and the plaintiffs-appellants, that Styer did not claim and was not seeking the right "to transport goods moving in interstate commerce from any Minnesota point to any Minnesota point" upon the "grandfather" routes.

(b) There is no evidence that during the "grandfather" period Styer picked up or delivered any freight at any of the Minnesota points except St. Paul and Minneapolis, or held out to serve such points.

(c) The evidence shows without conflict that during the "grandfather" period Styer's eastbound operation was an irregular route operation to scattered points in Minnesota, that he did not conduct an eastbound regular route operation, and that he did not serve any of the points

for which authority was granted by the Commission's order except St. Paul and Minneapolis.

(d) Styer made the further statement in said stipulation that "he does seek to transport from points in South Dakota on these routes to all points in Minnesota irregularly," thereby claiming irregular route "grandfather" rights eastbound but not regular route rights.

2.

The Commission's order authorized Styer to begin new operations over regular routes between St. Paul, Minnesota, and points in South Dakota, serving all Minnesota points on such routes, both east and westbound, under Section 207 (a) which requires a showing that such operations are required by present or future public convenience and necessity. The order was erroneous and should have been annulled by the District Court as to all points in Minnesota except St. Paul and Minneapolis, for the following reasons:

(a) Prior to the hearing on his application before the Joint Board Styer filed an amendment to his application withdrawing from such application his request for authority as to "All service in interstate commerce between points in Minnesota."

(b) There is a complete absence of evidence that present or future public convenience and necessity requires such service to said Minnesota points.

SUMMARY OF ARGUMENT.

THE "GRANDFATHER" CASE.

The Commission's order authorized Styer to operate over regular routes between St. Paul-Minneapolis and South Dakota points, serving all intermediate points both east and westbound.

The order was erroneous in authorizing westbound service to the intermediate Minnesota points for two reasons: (1) Styer stipulated that he was not claiming "grandfather" rights to carry property in interstate commerce between Minnesota points. (2) There was no evidence that Styer was in *bona fide* operation to any intermediate Minnesota point during the "grandfather" period.

The order was erroneous in authorizing eastbound service to the intermediate Minnesota points because Styer's evidence showed that during the "grandfather" period he was engaged in an irregular route service eastbound from South Dakota points to widely scattered Minnesota points, none of which were on the regular routes in Minnesota authorized by the order.

PUBLIC CONVENIENCE AND NECESSITY CASE.

The Commission found that public convenience and necessity require operation by Styer over regular routes between St. Paul-Minneapolis and points in South Dakota, serving all intermediate points on such routes in both directions. The Commission's order was erroneous

in authorizing service to the intermediate points in Minnesota for two reasons: (1) Prior to the hearing Styer filed an amendment to his application withdrawing therefrom request for authority for service in interstate commerce between points in Minnesota. (2) There is no evidence in the record showing public convenience and necessity for service to the intermediate Minnesota points.

ARGUMENT.

I.

"GRANDFATHER" RIGHTS SHOULD NOT HAVE BEEN GRANTED TO SERVE ANY POINTS IN MINNESOTA EXCEPT ST. PAUL-MINNEAPOLIS.

In the "grandfather" proceeding the Commission's order authorized Styer to pick up and deliver freight, both east and westbound, at all points in Minnesota on the highways represented by the single black lines on the map which is inside the back cover page of this brief. It is our contention that no "grandfather" rights should have been authorized with respect to any Minnesota points on such highways except Minneapolis-St. Paul, hereinafter referred to as the Twin Cities. As somewhat different questions are involved in the east and westbound operations they will be considered separately.

1. WESTBOUND "GRANDFATHER" SERVICE TO MINNESOTA POINTS.

There are two independently sufficient reasons why the Commission erred in granting westbound "grandfather" authority to the intermediate Minnesota points:

(a) Styer stipulated that he was not claiming the right to carry property in interstate commerce between Minnesota points.

(b) There was no evidence that Styer was in bona fide operation to any intermediate Minnesota point during the "grandfather" period.

THE STIPULATION.

At the hearing before the Joint Board the following took place between Mr. Janes, representing the railroad protestants, and Mr. Moore, representing the applicant; Mr. Norgaard was chairman of the Joint Board (R. 97):

"Mr. Janes: Do I understand that the applicant is seeking grandfather rights into any of the Minnesota towns located on the routes he has referred to as regular routes in his exhibit, map of Minnesota, Exhibit 1?

"Mr. Moore: Applicant does not seek any rights, grandfather rights, to transport goods moving in interstate commerce from any Minnesota point to any Minnesota point upon the routes described, but he does seek to transport from points in South Dakota on these routes to all points in Minnesota irregularly. If that is not clear, I can amplify it further.

"Mr. Norgaard: I should think that would be clear enough.

"Mr. Moore: From the Twin Cities to any Minnesota points goods moving in interstate commerce, we don't propose to transport under this application."

(fol. 128) "Mr. Janes: You would not take a shipment from Chicago and deliver it to applicant's truck line at New Ulm, Mankato or any other points on these regular routes?

"Mr. Moore: That is correct.

"Mr. Janes: Those are marked on your map Exhibit 5, I think?

"Mr. Moore: All of those described in the application.

"Mr. Janes: That is a correct statement?

"Mr. Moore: Yes.

"Mr. Janes: But you do claim rights in South Dakota, when you pick up commodities in South Dakota, to deliver those commodities in Minnesota, to points in Minnesota on those routes?

"Mr. Moore: Yes.

"Mr. Norgaard: Amplify that.

"Mr. Moore: Applicant does not claim grandfather rights under this application to transport goods moving in interstate commerce from points in Minnesota to other points in Minnesota; but this is in no way a waiver of his claim under the application to transport goods from authorized points in South Dakota, regular routes and the territory as described by those routes to any point in Minnesota. (pp. 96-97.)"

Styer later testified as follows:

"We are not asking for the right to transport commodities in interstate commerce from Minneapolis to Albert Lea. We are specifically restricting so as to not apply in interstate commerce between points in Minnesota." (R. 104.)

Effect of the Stipulation.

The effect of the stipulation was to withdraw from the proceeding the issue with respect to authority to provide service between Minnesota points. *Milne Lumber Company* v. *Detroit, Grand Haven & Milwaukee Railway Company, et al.*, 146 I. C. C. 514; *Charges for Protective Service to Perishable Freight*, 215 I. C. C. 684, 692; *Seattle, L. & S. Ry. Co.* v. *Union Trust Co.*, 79 Fed. 179, 188 (C. C. A. 9); *Williston on Contracts*, 1936 Rev. Ed., par. 204A.

Therefore, after the stipulation was in the record the issue with respect to service between Minnesota points was not before the Commission and any evidence that previously may have been received in this connection either disappeared from the case or became irrelevant. The effect of the stipulation was to advise appellants that it would not be necessary and that they would not be permitted to introduce any evidence with respect to the previously claimed rights to provide service between Minnesota points. Were this not true and if the Commission was thereafter per-

mitted to pass on the withdrawn issue and consider evidence previously introduced to support a finding in that connection, appellants would be deprived of a full and fair hearing. As stated by this Court in *Morgan* v. *United States*, 304 U. S. 1, 18:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of an opposing party and to meet them."

After the stipulation became a part of the record appellants had the right to assume that the issue covered by the stipulation was no longer in the case and that they were not required to present any evidence relating to that issue. If the action of the Commission and the District Court, in disregarding the stipulation and basing a finding upon evidence previously introduced relating to the issue withdrawn, is upheld, the result will be to deprive the protestants of the right to meet that issue and of a fair hearing.

Furthermore, if parties appearing in cases before the Commission are now to be advised that they cannot depend upon stipulations entered into at the hearing, that is going to impose a great volume of additional work upon parties and upon the Commission. Every person who has ever practiced before the Commission knows that on numerous occasions stipulations between parties, made during the course of the hearing, withdraw issues and thereby obviate the necessity of one or many witnesses testifying. Are Commission examiners now to be told that, despite stipulations of the parties withdrawing issues, they must nevertheless permit introduction of full and complete evidence on the withdrawn issues in order that parties may surely protect their interests?

THERE WAS NO EVIDENCE THAT STYER WAS IN BONA FIDE OPERATION TO ANY INTERMEDIATE MINNESOTA POINT DURING THE "GRANDFATHER" PERIOD.

Without regard to the stipulation, the Commission's order was erroneous because there is no evidence of operation during the "grandfather" period to any intermediate Minnesota point. Styer commenced operation as a common carrier of property by motor vehicle on April 1, 1935 (R. 90). Up to and including June 1, 1935, the "grandfather" date, he had not picked up or delivered any freight at any point in Minnesota on the routes represented by the single black lines on the map, except the Twin Cities. This appears without question from Styer Exhibits 3 (R. 127), 15 and 16 (R. 166). These three exhibits are abstracts made by Styer from his freight bills showing all points in Minnesota and South Dakota at which freight was picked up and delivered during the period of his operation to and including June 1, 1935 (and for some months thereafter). Exhibit 3 was the original exhibit prepared to show this information and exhibits 15 and 16 are supplementary thereto. Although the exhibits show a large number of shipments, they fail to show any to or from any Minnesota points on the "grandfather" routes, other than the Twin Cities, on or prior to June 1, 1935.

DISTRICT COURT'S FINDINGS.

The District Court made the following findings of fact with respect to Styer's "grandfather" service. ("Routes 1 and 2" are the "grandfather" routes in question):

> "4. There was no evidence adduced before the Commission that prior to June 1, 1935, Styer had transported any commodities to or from intermediate points in Minnesota on routes 1 and 2. The evidence was that prior to that date Styer had transported commodities from the Twin Cities (St. Paul and Minne-

apolis) in Minnesota to Huron and Mitchell in South Dakota over routes 1 and 2, had served intermediate points in South Dakota thereon, and had transported commodities from South Dakota points to points in Minnesota which were not on routes 1 and 2." (R. 66.)

And in its opinion the Court said (R. 60):

"It appears that the 'grandfather' rights claimed by Styer in his testimony before the Commission were: (1) to transport freight from the Twin Cities to South Dakota points over regular routes, but not to Minnesota intermediate points or between such points; and (2) to transport freight from South Dakota points to all points in 'a small territory in the southwestern part of Minnesota' over irregular routes."

It is true that the Court found (R. 66):

"5. There was evidence before the Commission sufficient to justify the inference that prior to June 1, 1935, Styer was able to serve intermediate points in Minnesota on routes 1 and 2, and had held out service to such points."

But in its opinion the Court explained this finding as follows (R. 60):

"The evidence before the Commission showed that on June 1, 1935, Styer's transportation business was in its infancy; that he then had four transportation units; that his regular route operation was from the Twin Cities to South Dakota points; that he had actually rendered no service to or between intermediate Minnesota points on his routes; that his eastbound operation was to off-route points in Minnesota, but that he had served intermediate points in South Dakota on his regular routes. Styer testified, however:

" 'On and prior to June 1, 1935, I solicited business for intermediate points on the regular routes I operated over. I contacted personally quite a few shippers. * * * It was my purpose from the beginning to solicit and render service to the intermediate points.'

"While it seems probable that in this testimony Styer was referring to service from the Twin Cities to South Dakota intermediate points, since on and prior to June 1, 1935, his tariffs apparently covered no other intermediate points on his routes, we think the Commission was free to place its own interpretation upon his testimony as to the extent of service rendered."

COMMISSION'S FINDINGS.

With respect to the westbound "grandfather" operations the Commission found:

"There is no doubt that applicant transported commodities of a general nature between Minneapolis and St. Paul, hereinafter called the Twin Cities, within which term we shall also include South St. Paul, Minn., on the one hand, and, on the other, Brookings, Huron, and Mitchell, S. Dak." • • • (R. 9.)

"Prior to June 1, 1935 applicant served the intermediate points on routes 1, 2, 4, and 5 of Brookings, Iroquois, Forestburg, and Madison.[1] Applicant does not claim the right to transport interstate shipments from the Twin Cities to points on his routes in Minnesota, but claims that such points were served eastbound from South Dakota. Although the proof of service at intermediate points on the above routes is not impressive, when considered in connection with the fact that operations by applicant were instituted only 2 months prior to the statutory date and the testimony of applicant that he did not limit his service to terminal points but held out service at all intermediate points and actually solicited such business, we are convinced that he should be authorized to serve all intermediate points on routes 1, 2, 4, and 5, and that a restriction to serve certain intermediate points in one direction only would make the authority granted unnecessarily complicated and it will not be imposed." (R. 10-11.)

1. All in South Dakota.

COMMISSION'S FINDINGS ERRONEOUS.

There are three errors in that statement, to which we call attention briefly:

(1) The Commission stated: "—the proof of service at intermediate points on the above routes is not impressive—." If the Commission was referring to intermediate Minnesota points its statement is obviously in error because the plain and undisputed evidence shows *no service whatsoever* to intermediate Minnesota points on the "grandfather" routes on and prior to June 1, 1935, either westbound or eastbound.

(2) Although recognizing that applicant was not claiming westbound "grandfather" rights to intermediate Minnesota points, the Commission nevertheless gave him such westbound authority because it erroneously concluded that he was entitled to eastbound "grandfather" rights to the intermediate Minnesota points and it thought he should not be restricted to serve intermediate points in one direction (eastbound) only. So it appears that the Commission was led by its erroneous conclusion as to Styer's eastbound operation (to be considered in detail hereinafter) to disregard entirely Styer's stipulation disclaiming westbound "grandfather" rights to the Minnesota intermediate points and the entire lack of evidence to support such rights.

(3) The Commission referred to "—the testimony of applicant that he did not limit his service to terminal points but held out service at all intermediate points and actually solicited such business—." It is submitted: (a) There is no evidence as to any such holding out as to Minnesota points. (b) The Commission overlooked the fact that the testimony of applicant referred to was adduced prior to the time when applicant by stipulation and direct testimony specifically disclaimed any "grandfather" rights to serve westbound intermediate points in Minnesota. (c)

Such "holding out" would be insufficient to establish "grandfather" rights in any event.

With respect to the facts of "holding out," it is evident that since Styer was not claiming any westbound "grandfather" rights to intermediate Minnesota points, he was not "holding out" to render such service. And the evidence affirmatively shows no such holding out; it shows that Styer's solicitation and holding out, as to westbound operations, was for service from the Twin Cities, on the one hand, to South Dakota points on the other hand. This appears clearly from Styer's testimony, from the last paragraph on page 92 of the record to the top of page 94, and Styer's Exhibit 5. (R. 134.) The exhibit is a schedule of rates from the Twin Cities to South Dakota points; no intermediate Minnesota points appear upon it. Styer's testimony, above referred to, is all to the effect that the service he held out to shippers westbound from the Twin Cities during the "grandfather" period was to the points shown on Exhibit 5; he definitely related what he called the "intermediate points" to which he was holding out service to the points on Exhibit 5.

As indicated, the District Court construed Styer's testimony with respect to "holding out" as applicable only to the South Dakota intermediate points. Assuming, for purpose of argument, that in the first instance, and prior to Styer's express disclaimer, the Commission would be justified in relating such testimony to all intermediate points, certainly there would be no warrant for doing so after Styer expressly disclaimed any "grandfather" rights to provide service for intermediate Minnesota points and this issue had been withdrawn from the case. In basing a finding of "grandfather" rights with respect to Minnesota points in westbound service the Commission not only went outside of the issue but adopted testimony, which was later

repudiated, in support of a finding in relation to an issue not in the case.

Assuming that Styer had meant to include the intermediate Minnesota points within the scope of his testimony and ignoring for the moment its later withdrawal, it is submitted that holding out of that attenuated character is wholly insufficient to establish "grandfather" rights. In *McDonald* v. *Thompson*, 305 U. S. 263, 266, the Court said that the concept of "*bona fide* operation" necessary for the establishment of "grandfather" rights

> "* * * excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service * * *."

In *Crescent Express Lines, Inc.* v. *United States*, 88 L. Ed. adv. 143, decided December 6, 1943, the applicant for "grandfather" rights, who had been conducting an irregular route common carrier passenger service in six-passenger vehicles, asked for authority to use in such business buses of larger seating capacity. The Court held that the Commission properly limited the "grandfather" certificate to six-passenger vehicles, saying:

> "We are of the view that the power of the Commission to limit the certificate as it proposes to do is in accord with the purposes of the Motor Carrier Act. When Congress provided for certificates to cover all carriers which were already in operation, it did not throw open the motor transportation system to more destructive competition than that already existing."

To the same effect are *Noble* v. *United States*, 319 U. S. 88, and *Alton Railroad Co.* v. *United States*, 315 U. S. 15. In the *Alton* case the carrier had actually served the State of Arkansas before June 1, 1935, but had made no deliveries there for more than a year after that date. In holding that the applicant had failed to keep initiated "grandfather" rights alive the Court said (p. 25):

> "*A mere holding out will not alone suffice* to bridge

the long gap extending through and beyond one entire automobile production year, since applicant carries the burden of establishing his right to the statutory grant." (Emphasis supplied.)

MERE OPERATION OVER ROUTE INSUFFICIENT TO ESTABLISH "GRANDFATHER" RIGHTS.

It may be suggested that since Styer traveled westbound over regular "grandfather" routes he should be given "grandfather" rights to all Minnesota intermediate points on such routes regardless of the fact that he served none of them. The Commission has consistently held that mere operation over a highway is not sufficient to lay a foundation for "grandfather" rights to serve points on that highway to which no actual service is made during the "grandfather" period. *W. D. Gill Common Carrier Application*, 29 M. C. C. 475; *Denver-Chicago Trucking Company Common Carrier Application*, 27 M. C. C. 343. In the *Gill Application* the Commission said (p. 476):

> "In his petition, applicant contended that, having been found by us to have been in bona fide operation over the routes in question, he has a vested right to serve all points along those routes, and that the denial of any of such points is contrary to the requirements of the 'grandfather' clause of section 206 (a) of the act that we issue a certificate if the applicant or predecessor was in bona fide operation on June 1, 1935, 'over the route or routes or within the territory.' With this contention we do not agree. Section 208 (a) of the act specifically provides:
>
> > 'Any certificate issued under section 206 or 207 shall specify the service to be rendered * * * and the *intermediate* * * * *points, if any,* at which * * * the motor carrier is authorized to operate; * * *.'" (Emphasis supplied.)

Applicable to this point also are the several decisions of this Court last above cited.

The principle that mere operation over a route is insufficient to establish "grandfather" rights is particularly applicable here because it is clear from the evidence above set out and discussed that what Styer intended to carry on, and was carrying on, was a service *between the Twin Cities and South Dakota points.* To authorize him to serve the intermediate Minnesota points would vastly increase the scope of the operations he was actually conducting during the "grandfather" period.

McCracken Case Erroneously Decided.

In *McCracken* v. *United States,* 47 F. Supp. 444 (D. C. Ore.), the Court apparently held that the Commission is empowered, in a "grandfather" rights case, to require the applicant to serve points as to which he has not established "grandfather" rights or which he may not want to serve.

It is submitted that this decision is clearly erroneous. The Commission itself held expressly to the contrary in *Pan-American Bus Lines Operation,* 1 M. C. C. 190. The question there was whether a bus company could limit its operation to certain large terminal and large intermediate points and refuse to serve certain smaller intermediate points. The Commission found that an applicant could so restrict the scope of the authority desired and that it had no power to require service to intermediate points, saying, in part (pp. 205-206):

> "The definition of 'common carrier by motor vehicle' in section 203 (a)(14) recognizes that common carriers of property may restrict their operations to a 'class or classes of property', but does not indicate that common carriers of passengers may similarly restrict their operations to a class or classes of passengers. However, it appears that *common carriers, whether of property or passengers, may restrict their operations to certain named points,* for it is provided in section 208 (a) that a certificate shall specify 'the

> service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, * * *, the motor carrier is authorized to operate.'" (Emphasis supplied.)

The error of the Oregon District Court is also clearly shown by a comparison of Parts I and II of the Interstate Commerce Act, regulating, respectively, railroads and motor carriers. Section 1 (18) requires railroads to obtain certificates of convenience and necessity before building lines or rendering service, and the corresponding requirements respecting motor carriers are found in Sections 206 (a) and 208 (a). But section 1 (21) is expressly and entirely devoted to giving the Commission power to *compel railroads* to extend their lines or render service against their will, while the granting of any corresponding power to the Commission with respect to motor carriers is entirely lacking, even by inference. In construing Part II of the Interstate Commerce Act the Commission has been very careful to hold to the rule, a familiar principle of statutory construction, that where Part I contains an express provision relating to railroads, but there is no corresponding express provision in Part II relating to motor carriers, it will be presumed that Congress did not intend to carry that provision or any similar powers or requirements into Part II. See *Barrows Porcelain Enamel Co.* v. *Cushman Motor Delivery Co.*, 11 M. C. C. 365, 366, where the Commission said:

> "Part I of the Interstate Commerce Act contains specific provisions which empower us to award reparation thereunder. No such provisions, however, are embraced, either specifically or by necessary implication, in the Motor Carrier Act, 1935. If the Congress had intended to grant us such broad authority, it clearly would have done so in unmistakable language. In the absence of such language, we must conclude

that we are without power to award reparation in instances where it is found that the provisions of the Motor Carrier Act, 1935, have been violated."

Part I of the Act contains the "commodities clause", section 1 (8), forbidding railroads, with minor exceptions, to haul their own property, and the "long and short haul" clause, section 4. Part II contains no similar restrictions on motor carriers. No one, except perhaps those who advocate the *McCracken* case theory, would suggest that Congress, by omitting to include these restrictions in Part II, intended to have them apply to motor carriers. Yet it is just as sensible to say that section 1 (21) which specifically permits the Commission to compel railroad extensions was intended by Congress to apply to motor carriers even though Congress failed to carry its provisions or anything remotely resembling them into Part II.

There are other errors in the Court's decision which are apparent on its face, such as the statement citing, but contrary to, *Alton Railroad Co.* v. *United States*, 315 U. S. 15: "No notice is required to competitors," etc. In making that statement the Oregon Court obviously overlooked Section 205 (e) of the Interstate Commerce Act.

2. EASTBOUND SERVICE TO MINNESOTA POINTS.

Styer's evidence shows that the only eastbound service he was either holding out or rendering during the "grandfather" period was an irregular route service to many widely scattered points in Minnesota, none of which, except the Twin Cities, were on the regular routes for which "grandfather" authority was granted. In authorizing this regular route service in the face of the undisputed evidence that Styer had been conducting an irregular route service during the "grandfather" period the Commission acted contrary to the rule of *United States* v. *Maher*, 307 U. S. 148.

Styer testified before the Joint Board (R. 103-105):

"What we are asking for is a territory to which we offered service prior to June 1 and to which we have offered service up to the present date, over irregular routes on loads when available because there is no direct service to that point and there is a demand for service. We wanted it as a territory, to be operated in conjunction with our regular route operation (p. 280). *In other words our irregular operations is intended to take care of the movement mainly from South Dakota back into Minnesota.* We are not asking for the right to transport commodities in interstate commerce from Minneapolis to Albert Lea. We are specifically restricting so as to not apply in interstate commerce between points in Minnesota. *In short our operations from the Twin Cities to the South Dakota territory is chiefly our regular route operations* (p. 281). (Emphasis supplied.)

"Originally we asked for territory in the entire State of Minnesota. We have now restricted that to a small territory in the southern and southwestern part of Minnesota. Exhibit 26 shows a line drawn in Minnesota over U. S. 52 from its junction with the Minnesota-Iowa line to its junction with Minnesota Highway 28 and thence over the latter highway to its junction with the South Dakota-Minnesota line. That line shows the outer boundaries of our territory in Minnesota and it is in that territory that we are claiming operating rights (p. 282, 283)." (R. 103-104.)

"Q. Now look at the green dots on the map of Minnesota. Now did you serve from your South Dakota points around June 1, 1935, those Minnesota points or those Minnesota points to the South Dakota points?

"A. Yes.

"Q. What are they, read them.

"A. Moorehead, Bemidji, Detroit Lakes, Fergus Falls, Hill City, Grand Rapids, Two Harbors, Duluth, Atkinson, Brainerd, Little Falls, Sauk Center, Pine City, Ortonville, Willmar, Montevideo, Granite Falls, Owatonna, Waseca, Winona, Rochester, Albert Lea,

Blue Earth. Those are most of them, I may have missed some of them.

"Q. Baker and Grand Rapids?

"A. Baker is not marked in green here; but I do recall that we handled shipments to Baker.

"Q. Did you name Redwood Falls and Marshall?

"A. Redwood Falls and Marshall are on the route. I made no manifests or trip sheets or bills as to these shipments (pp. 304-305)." (R. 105.)

A short time before that testimony Styer's counsel had said:

"Applicant does not seek any rights, grandfather rights, to transport goods moving in interstate commerce from any Minnesota point to any Minnesota point upon the routes described, but he does seek to transport from points in South Dakota on these routes to all points in Minnesota irregularly." (R. 97.)

For convenience the cities named in the foregoing testimony are checked with green marks on our map. It will be seen (1) that they are scattered all over Minnesota, and (2) that none of the points named are on the "grandfather" routes authorized, except for the ambiguous reference to Redwood Falls and Marshall. With respect to those two cities, Styer's evidence shows that the first service to them was *after* June 1, 1935. (R. 132.)

District Court's Findings.

The District Court's findings set out above in discussing the westbound service contain also the findings as to eastbound service. For convenience we repeat part of these briefly. The Court found (R. 66) that prior to the "grandfather" date Styer had not transported any commodities to or from intermediate points in Minnesota on routes 1 and 2 (the "grandfather" routes) but that he

"* * * had transported commodities from South Dakota points to points in Minnesota which were not on routes 1 and 2."

And in its opinion the Court said that the eastbound "grandfather" rights claimed by Styer were (R. 60):

> "* * * (2) to transport freight from South Dakota points to all points in 'a small territory in the southern and southwestern part of Minnesota' over irregular routes.
>
> "The evidence before the Commission showed that on June 1, 1935, * * * his eastbound operation was to off-route points in Minnesota * * *."

COMMISSION'S FINDINGS.

With respect to the eastbound "grandfather" service the Commission made the following findings in its report:

> "In addition to the operations conducted over regular routes described above, applicant also claims to have been engaged in the transportation of general commodities over irregular routes between points in that part of South Dakota described in his amended 'grandfather' application, on the one hand, and on the other, points in Minnesota." (R. 11.)

Reference to the report will show that the "regular routes" so referred to involve only the *westbound* "grandfather" operations and no eastbound operation. After making the foregoing statement, the report analyzes Styer's evidence and concludes, on the basis of that evidence, (a) that during the "grandfather" period Styer's eastbound operation was an irregular route operation, and (b) that sometime *after* June 1, 1935, and by 1938, that operation had "evolved" into a regular route operation. The report then states:

> "While the testimony of applicant as to operations over irregular routes as substantiated by reference to particular shipments handled before June 1, 1935, might warrant granting of authority to operate over irregular routes, the complete documentary evidence covering a subsequent period during 1938 strongly indicates that applicant's business has evolved into

amounts to an acquiescence." *Mary Jane Stevens Co.* v. *First Nat. Bldg. Co.*, 57 Pac. (2d) 1099, 1125 (Utah). Here appellants had no notice or knowledge of the lease or sale until after it had been consummated.

THERE WAS NO CHANGE OF POSITION BY APPELLEES.

The defense of laches is not open to appellees because there was no change of position by them by reason of the alleged delay in commencing the action. This is clearly shown by appellees' own evidence.

EVIDENCE AS TO STYER.

The evidence respecting Styer's plea of laches divides into two phases. The first phase comprises the period from the start of his operations, April 1, 1935, to the date appellants' petition for reconsideration was overruled, April 6, 1942. During that period Styer expanded his business, added to his equipment, went heavily into debt, and approached insolvency. The second phase starts with April 6, 1942. Only after that date could appellants commence this action. It is important to note that throughout this second phase Styer was insolvent and that the entire scope of his activities consisted in arranging for the sale of his business in order to avoid loss of everything he had put into it. He had to sell. He arranged to sell. Delay, if any, in the commencement of this action did not prevent the sale or affect its terms in any respect. He cannot point to the least item of prejudice by reason of appellants' alleged slowness in bringing the action, because after April 6, 1942, he accomplished everything he wanted to accomplish despite the alleged slowness.

> that of a regular-route operation with only occasional or sporadic trips to off-route points or points in irregular-route territory. We conclude that upon the evidence we are not warranted in granting applicant authority to transport either general or specific commodities over irregular routes under the 'grandfather' clause of the act." (R. 12.)

It is submitted that the Commission was clearly in error in granting regular route eastbound "grandfather" authority to serve the intermediate Minnesota points in the face of the undisputed evidence (a) that Styer's "grandfather" operation eastbound had been over irregular routes without any service to such intermediate Minnesota points, and (b) that *after* June 1, 1935, that irregular route operation had *evolved* into a regular route operation. No clearer case could exist for application of the principle expressed in *United States* v. *Maher*, 307 U. S. 148. In that case a motor carrier had been engaged in irregular route operations on and prior to June 1, 1935, but after that date discontinued them and instituted a regular route operation. In his "grandfather" application he requested regular route authority. The Commission denied any authority because: (1) the regular route operation was not in existence on June 1, 1935; and (2) the irregular route operation had been abandoned after June 1, 1935, that is, had not been "so operated since that time" as required by Section 206(a). The Court said in part:

> (p. 151) "The Interstate Commerce Commission, Division 5, on October 27, 1937, found the facts to be as follows: From 1931 until May 29, 1936, the appellee had engaged in bona fide 'anywhere-for-hire' operations in Oregon with occasional entries into Washington. There were rare trips to Seattle, no service at all to most of the intervening points, and no showing that passengers were transported on return trips to Portland. On May 29, 1936, the appellee began his regular-route service between Portland and Seattle

The First Phase.

Styer's operation commenced April 1, 1935, and the report of the Commission, by Division 5, was filed October 24, 1941; and during this period he operated his business without any indication from any official source that he would be permitted to continue to do so except for the limited "grandfather" authority granted him by the Joint Board which heard his "grandfather" application, and to which he took exception. (R. 2.) The Joint Board hearing his public convenience and necessity application had denied it in its entirely. (R. 3.) Notwithstanding, during this period he invested money and effort, increasing his motor truck equipment from two straight trucks on April 1, 1935, to four trucks, five tractors and five semi-trailers on December 12, 1938, the date the hearings began before the Joint Boards. (R. 90; Styer's Exhibit No. 22, R. 182.) After December 12, 1938, Styer continued to add equipment each year. Exhibit "A" (a copy of the "Agreement of Lease" between Styer and Glendenning) lists as the motor vehicle equipment owned by Styer on September 22, 1942, ten tractors, thirteen trailers, nine trucks, and two passenger automobiles, with a depreciated book value of $41,894.73. These are of year models ranging from 1935 to and including 1941. (R. 46.)

On October 24, 1941, the report and order of the Interstate Commerce Commission, Division 5, was filed. Appellants seasonably filed with the Commission a petition for reconsideration. Between October 24, 1941, and April 6, 1942, when appellants' petition was denied, Styer continued to expand his business, as he had been doing for 6 years and 7 months prior to that date, regardless of the filing of the appellants' petition for reconsideration. Between October 24, 1941, and April 6, 1942, Styer expended $1,600 in the purchase of certain operating rights to con-

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ARGUMENT.

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which he conducted regularly since that time. But upon the institution of the regular-route service between Portland and Seattle the appellee discontinued the 'anywhere-for-hire' operations theretofore conducted."

(pp. 155-156) "In differentiating between operations over the 'route or routes' for which an application under the 'grandfather clause' is made as against operations 'within the territory,' Congress plainly adopted the familiar distinction between 'anywhere-for-hire' bus operations over irregular routes and regular route bus operations between fixed termini. Such recognition is implicit also in the provision of Sec. 208 (a), 49 U. S. C. A. Sec. 308 (a) that 'Any certificate issued under Sec. 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate.' Since the new regular route of appellee was not in existence on June 1, 1935, and the irregular 'anywhere-for-hire' service was not 'so operated,' as required by Sec. 206, when the Commission passed upon the application for a 'grandfather' certificate, the Commission rightly rejected the application."

In *Crescent Express Lines, Inc.* v. *United States, supra* (88 L. Ed. adv. 143), where the Court held that operation of six-passenger automobiles for hire during the "grandfather" period did not warrant the granting of "grandfather" rights to operate passenger buses, the Court said:

"Consequently we held in *United States* v. *Maher*, 307 U. S. 148, that operations over irregular routes did not provide the requisite continuity to support an application for regular service between fixed termini, even when the highway between the fixed termini had been occasionally used for part of the distance in the irregular route operations."

CASES CITED.

STATUTES CITED.

nect up his existing system with Sioux City, Iowa. (R. 70-71.)

The Second Phase.

Between April 6, 1942, and the commencement of this action on October 30, 1942, Styer's activities were devoted to saving his business from financial collapse and negotiating for the lease and sale of it to Glendenning. There was no further expansion. He borrowed $6,000 from his brother on May 25, 1942, and negotiated for the Glendenning deal, but this loan and such negotiations were prompted solely by the fact that he was in the utmost financial straits and were not due to appellants' failure to seek review of the Commission's order. He was not able to obtain financing for his business and faced the loss of it unless he could sell either to Glendenning or someone else. (R. 72-73.) Styer concedes that unless he could sell advantageously he would lose all the value in his business; secured creditors were about to seize his irreplaceable motor vehicle equipment and this would cause loss of his operating rights. (R. 73-74.) The $6,000 loan was made on May 25, 1942. If this action had been commenced on May 26, 1942, it would not have prevented the making of this loan; and assuredly it could not be claimed that there would be laches in starting the suit on that date.

So far as Styer is concerned the filing of the suit made no difference with respect to his negotiations with Glendenning. Despite the fact that both Styer and Glendenning knew of the filing of the suit on the morning of the hearing before the Interstate Commerce Commission on the application for approval of the lease and sale, both proceeded to do all things necessary to effectuate their negotiations. (R. 74-75, 77.) If appellants had commenced this suit, say in May of 1942, Styer either would or would not have his present contract with Glendenning. If he did not have such a con-

II.

IN THE PUBLIC CONVENIENCE AND NECESSITY CASE, AUTHORITY SHOULD NOT HAVE BEEN GRANTED TO SERVE ANY POINTS IN MINNESOTA EXCEPT ST. PAUL-MINNEAPOLIS.

The Commission, in No. MC-47644 (Sub. 1), the public convenience and necessity proceeding, authorized Styer to serve in both directions all points in Minnesota on the highways represented by the double black line on the map inside the back cover page of this brief. It is submitted that this was error and that service on these routes in Minnesota should have been limited to the Twin Cities for the following reasons:

(1) Styer filed a written amendment to his application in this proceeding, before the hearing, by which he withdrew from his original application his request for authority to serve various points including:

> "3. All service in interstate commerce between points in Minnesota (R. 195-196)."

This amendment was accepted by the Joint Board (R. 190), and the application remained in that form at the time of the hearing and at the time the Commission's order was issued.

(2) Styer offered no evidence showing public convenience and necessity for service to or from any point in Minnesota except St. Paul-Minneapolis.

We submit that the Commission had no power to grant this authority specifically withdrawn from the application. Section 206 (a) of Part II of the Interstate Commerce Act, 49 U. S. C. A. 306 (a), previously referred to, authorizes the granting of "grandfather" certificates in appropriate cases, and provides that in the event a "grandfather" certificate is not warranted:

> "Otherwise the application for such certificate should be decided in accordance with the procedure

MISCELLANEOUS.

tract he would be worse off than he is now. Whether the suit had been commenced in May or October, the important thing to Styer now is his contract with Glendenning, and his position as to that was not changed in any respect by reason of the suit not being brought until October.

EVIDENCE AS TO GLENDENNING.

Glendenning claims that he so changed his position between April 6, 1942, and October 30, 1942, as to give rise to the principle of laches in his favor. A brief consideration of the facts makes it evident that his claim is not sound.

On September 22, 1942, Glendenning entered into a contract with Styer for the lease and later for the purchase of Styer's rights. On October 31, 1942, the day set for the hearing before the Examiner on the proposed transfer from Styer to Glendenning, Glendenning knew that this suit had been brought, but nevertheless he went ahead with the proceedings before the Interstate Commerce Commission looking to the confirmation and approval of his sale with Styer. (R. 74-75, 77, 79-89.)

Glendenning's contracts with Styer, and the proceedings before the Commission which have resulted in their approval, are of course all based on the legal existence of the subject matter of such contracts. If in this suit Styer's rights are impared or destroyed Glendenning's contracts with Styer are subject to rescission in whole or in part at Glendenning's option. *Allen* v. *Hammond*, 11 Peters (U. S.) 63; *United States* v. *Golden*, 34 F. (2d) 367 (10th C. C. A.); *United States* v. *Charles*, 74 F. 142 (8th C. C. A.)

Glendenning testified that he had spent $11,791.85 for tires and repairs for Styer's motor vehicle equipment. It is significant that $2,873 of this amount was spent between

provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly."

Section 207 (a) provides:

"* * * a certificate shall be issued to any qualified applicant therefor, authorizing the *whole or any part of the operations covered by the application*, if it is found that the applicant is fit, *willing*, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

The Commission is permitted by the act to authorize "*the whole or any part of the operations covered by the application.*" Contrary to that provision the Commission authorized operations not only not covered by the application but affirmatively withdrawn and disclaimed by the amendment.

By this amendment Styer asserted that he was not *willing* to perform the service withdrawn by the amendment. Under Section 207 (a) the Commission lacked power to issue an order providing for such unwilling service. Willingness must be determined by the record at the time of the hearing.

The decisions cited above, pp. 12-13, 19-20, are applicable here.

Styer and fourteen witnesses for him testified in the public convenience and necessity proceeding. (R. 190-195.) All testified solely as to the need for Styer's service between the Twin Cities on the one hand, and South Dakota points on the other hand. Of course, nothing else was to be expected in view of the amendment to the application, and his statement therein: "*the purpose of the proposed amendment is simply to conform the application to the proof that will be offered.*" (R. 197.)

October 20 and 31, 1942; that is, even prior to the hearing before the Examiner on Glendenning's application to purchase. The remainder of it was spent after Glendenning knew of this suit. (R. 77.) Consequently it is apparent that before his application for purchase was heard he was willing to take whatever chance there was in spending the $2,873, and after he learned, on October 31, 1942, of the filing of this suit, he was willing to take whatever chance there was in spending $8,918 more. The tire and repair expense was upon 10 trucks, 10 tractors, and 9 trailers, all equipment as to which, we think the Court can take judicial notice, a great scarcity exists and the present demand greatly exceeds the supply. Vehicles now being used are, in fact, irreplaceable. (R. 74.) It is a fair conclusion that Glendenning's willingness to spend $8,918 to repair this equipment after learning of this suit shows that he would not have been deterred from spending the entire amounts he laid out had he known, before he spent anything, that this suit was to be filed. The $8,918 was spent during a period of four months after the suit was filed. (R. 77.)

We submit that the evidence, much of it furnished by Styer and Glendenning, conclusively shows that the filing of this suit on October 30, 1942, and not earlier, did not affect any of the activities of Styer and Glendenning before that date. Styer did what he had to do to keep his business alive and available for sale to Glendenning; if he had not taken such steps he would have lost his business and his operating rights, and any delay in filing the suit did not affect that situation or prejudice his prospects of sale. Glendenning's interest lay in consummation of the sale to such an extent that he spent $8,918 in furtherance of it after he knew of commencement of this suit.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 482.

CHICAGO, SAINT PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; CORNELIUS W. STYER, DOING BUSINESS AS NORTHERN TRANSPORTATION COMPANY; AND GLENDENNING MOTORWAYS, INC.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

APPELLANTS' REPLY BRIEF.

Separate briefs have been filed by appellees Styer, Glendenning Motorways, Inc., and United States and Interstate Commerce Commission. Our reply brief is in two main divisions. In the first division we answer the arguments on laches in the Styer and Glendenning briefs. In the second we reply to the arguments of all appellees respecting the merits of the case.

THE APPLICABLE PRINCIPLES OF LAW.

In authorizing suits like this Congress did not fix any period of limitation. This is significant, since practically every other kind of action that can be brought in either Federal or State courts is subject to some limitation as to time of commencement. It is obvious that the omission to fix a limitation period for the bringing of this type of suit was not an oversight, as in statutes passed before and after enactment of the statute under which this action is brought Congress has fixed limitation periods for various other types of suits which may be maintained under the Interstate Commerce Act. See 49 U. S. C. A. Sections 3 (2) and (3); 16 (3) (a), (b), (c), (d), (e), (f), and (h); 19a (h); 20 (11); 308 (f); and 318.

Furthermore, it is the established rule, an obvious one, that where the legislature has omitted to fix a period of limitation, such omission is presumed to be intentional and no statute of limitation can be applied by the courts by analogy to existing statutes or otherwise. *Kirkman* v. *Hamilton*, 6 Peters (U. S.) 20, 23; *Bedell* v. *Janney*, 9 Ill. 193, 207-210; *Baker* v. *Kelley*, 11 Minn. 480, 492.

We have been able to find only two decisions which have considered the question of laches in connection with suits of the instant character, and in both of them the plea of laches was denied.

In *The Chicago Junction Case*, 264 U. S. 258, the Interstate Commerce Commission, after hearing, and by order dated May 16, 1922, authorized New York Central Railroad to acquire the capital stock of a belt line railroad serving the Chicago switching district and authorized that belt line railroad to lease another belt line railroad. The effect was to give control of these two switching railroads to the New York Central, despite the fact that they pro-

For the above reasons, which are briefly summarized at pages 8-9 hereof, the Commission's order should be annulled to the extent pointed out herein.

Respectfully submitted,

WARREN NEWCOMB,
AMOS MATHEWS,
Attorneys for Appellants.

C. St. P. M. & O. Ry., et al v. [illegible]

Map of parts of Minnesota and South Dakota prepared by counsel for plaintiffs to accompany brief.

————(single line) outlines highways over which "grandfather" rights were granted in No. MC-47644, authorizing service both ways to and from all points on highways.

═══(double line) outlines highways over which authority was granted in No. MC-47644 (Sub. No. 1) application, based on showing of public convenience and necessity, authorizing service both ways to and from all points on such highways. Also shows "grandfather" rights granted in No. MC-47644 authorizing service only between Twin Cities and Mitchell both ways, but not service to or from intermediate points, on highways between Twin Cities and Mitchell.

○ indicates all points in Minnesota and South Dakota at which shipments were originated, terminated, or interchanged, by Styer on or before June 1, 1935, of traffic moving either way between Minnesota and South Dakota points. Number indicates number of different days of such shipments at such points. Based on Styer Exhibits 3, 15, 16, and 18.

△ indicates, only for Minnesota points exclusive of Twin Cities, points at which shipments were originated, terminated, or interchanged, by Styer after June 1, 1935, and during remainder of 1935, of traffic moving either way between Minnesota and South Dakota points. Based on Styer Exhibits 3, 15, and 18.

38 indicates, only for Minnesota points exclusive of Twin Cities, points at which shipments were originated, terminated, or interchanged, by Styer during October and November, 1935, of traffic moving either way between Minnesota and South Dakota points. Based on Styer Exhibits 19 and 20.

⬭ indicates points identified (R. 105) in Styer testimony and not otherwise referred to in evidence.

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C. St. P. M. & O. Ry., et al v. United States, et al

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vided the only access for other railroads to many points in the Chicago switching district. On June 12, 1922, the petition for reconsideration of certain objecting railroads was denied. Immediately thereafter New York Central purchased the stock of the one railroad for $750,000 and caused such railroad to lease the second railroad at an annual rental of $2,000,000. On April 10, 1923, ten months after denial of the petition for reconsideration, the objecting railroads sued in Federal Court in Chicago to set aside the Commission's order, and were successful. With respect to the defendants' plea of laches the Court stated (264 U. S. p. 270):

> "The contention that the suit is barred by laches is clearly unsound. The situation of none of the defendants appears to have been affected by the brief lapse of time."

The second case is *Texas and Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Railway Co.*, 270 U. S. 266. While that suit was brought under the statutory authority involved here (see 315 U. S. 15) it was not one to set aside an order of the Commission but was brought to restrain alleged unauthorized construction of a railroad. The District Court granted injunction, the Circuit Court of Appeals reversed, and this Court sustained the District Court's judgment, saying:

> "The Santa Fe contends that the judgment denying relief was proper also because the Texas & Pacific had been guilty of laches. This defense was not passed upon by the Court of Appeals. The District Court overruled it as unsupported in fact, and also on the ground that a plaintiff suing under paragraph 20 represents the public as well as private interests and that, hence, a plaintiff's laches cannot operate as a bar. We need not determine whether the latter ground is sound; for the facts do not warrant a finding of laches."